No. 16,304

IN THE

United States Court of Appeals

For the Ninth Circuit

ESTATE OF J. LESLIE VOGEL, ROBERT G. PARTRIDGE and ELIZABETH S. VOGEL, Executors,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decision of the Tax Court of the United States.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

REPLY TO ARGUMENT OF RESPONDENT THAT THE EVIDENCE FAILED TO ESTABLISH THAT A TRANSMUTATION TOOK PLACE AND THEREFORE THAT THE COMMISSIONER CORRECTLY DETERMINED THAT THE ENTIRE PROPERTY OF DECEDENT AND HIS SPOUSE WAS COMMUNITY PROPERTY.

Respondent in his brief argues that the disputable presumption in Section 164 of the California Civil Code, that if property is acquired by a married woman by an instrument in writing it is her separate property rather than community property, is not sufficient to overcome the presumption that the determination

of the commissioner is correct. Standing alone there may be some merit to this contention. However, in the case at bar there was positive evidence that the parties treated their respective properties as separate property. While it is true that Elizabeth Vogel was never asked the legal conclusion whether she and decedent had ever entered into a transmutation agreement, she did testify to the facts that certain properties in her name were her own. (R. 165-171 incl.) Her testimony was corroborated by the manner in which such properties were segregated. Furthermore decedent's discussions with his attorney give additional weight to her testimony. Her son, Les Vogel, Jr. also testified to his familiarity with the treatment accorded the properties by Mrs. Vogel and decedent. (R. 88-103 incl.)

In this connection it should be noted that the probated will of decedent in Paragraph Fourth only included as community property such property standing in the name of decedent or decedent and his wife, either as tenants in common or as joint tenants. (R. 21.) It did not include property standing in the name of Elizabeth Vogel alone.

The record clearly supports a transmutation of the property in controversy from community property to separate property of the surviving spouse.

REPLY TO ARGUMENT THAT TAXPAYERS HAVE FAILED TO DEMONSTRATE THAT AN AMOUNT IN EXCESS OF $1,000.00 PER MONTH FOR 18 MONTHS WAS REASONABLE AND PROPER IN ASCERTAINING THE DEDUCTION FOR FAMILY ALLOWANCE.

Respondent's brief stresses the argument that the family allowance is not for support of adult children and therefore the surviving spouse should not be entitled to an allowance for such purpose. However it is not disputed that she should be allowed an adequate and reasonable amount for her support in the manner to which she had been accustomed. She had been accustomed to having her unmarried children living with her as well as a maid "living in". Certainly having her unmarried children living with her constituted a manner to which she was accustomed as much as did her employment and support of a maid. Respondent's assertion that taxpayer does not attack the reasoning of the Tax Court in this regard is erroneous.

REPLY TO RESPONDENT'S ARGUMENT THAT THE DEDUCTION FOR ATTORNEY FEES WAS NOT PROPERLY PUT IN ISSUE AND COULD NOT HAVE BEEN RAISED AS A NEW ISSUE UNDER THE TAX COURT RULE 50 COMPUTATION.

Respondent cites the pertinent part of Treasury Regulations 105, Section 81.34 as follows:

> "A deduction for attorneys' fees incurred in contesting an asserted deficiency or prosecuting a claim for refund should be claimed at the time such deficiency is contested or such refund claim is prosecuted."

Of course no deduction was claimed at the time the notice of deficiency was given or the petition for redetermination was filed because this counsel was not employed at the time.

However the matter was raised at the time such deficiency was contested at the trial (R. 186, 187) and counsel for respondent cross-examined the witness who testified as to such payment of attorney fees.

In *Hormel v. Helvering,* 312 U.S. 552, 85 L.Ed. 1037, the Supreme Court of the United States stated on pages 556 and 557 as follows:

> ". . . But those cases do not announce an inflexible practice, as indeed they could not without doing violence to the statutes which give to Circuit Courts of Appeals reviewing decisions of the Board of Tax Appeals the power to modify, reverse or remand decisions not in accordance with law 'as justice may require.' There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. See Blair v. Oesterlein Mach. Co. 275 US 220, 225, 72 L ed 249, 252, 48 S Ct 87.
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> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." . . .

The same reasoning applies to the attorney fees claimed as a deduction for the prosecution of this appeal.

REPLY TO RESPONDENT'S ARGUMENT THAT THE TAXPAYERS UNTIMELY RAISED AN ISSUE, IN THE COURSE OF THE TAX COURT RULE 50 COMPUTATION, CONCERNING THE DEDUCTIBILITY OF FUNERAL EXPENSES IN FULL WHEN THE ENTIRE ESTATE CONSISTS OF COMMUNITY PROPERTY, AND FURTHER, THE DEDUCTION WAS PROPERLY LIMITED TO ONE-HALF OF THE AMOUNT OF FUNERAL EXPENSES.

The reply to respondent's argument in re attorney fees is likewise applicable to the question of law involved as to funeral expenses.

In California funeral expenses are not debts of decedent nor are they administration expenses. They are debts of the estate. (*Cornitius Estate* (1957), 154 C.A. 2d 422, 316 P. 2d 438.)

Unfortunately counsel for petitioners has been unable to find any federal cases involving deductibility of funeral expenses as to decedents' estates in California. The cases cited are Washington cases. (*U. S. v. Merrill,* 211 F. 2d 297 and *Lang v. Commissioner,* 97 F. 2d 867.) The distinction is that in Washington the marital community is treated as an entity while in California it is not.

It is respectfully submitted that the Tax Court was in error in the specifications set forth by petitioners.

Dated, Richmond, California,
September 14, 1959.

GRANT G. CALHOUN,
Attorney for Petitioners.